

**BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

**MILK IN THE APPALACHIAN,
SOUTHEAST, AND FLORIDA
MARKETING AREAS**

DOCKET NO. 23-J-0019; AMS-DA-0003

**HEARING ON PROPOSED
AMENDMENTS TO
TRANSPORTATION CREDIT
PROVISIONS**

REC'D - USDA/OALJ/HCO
2023 APR 19 3:20 PM

Post-Hearing Brief of Select Milk Producers, Inc.

I. Introduction

Select Milk Producers Inc. (“Select”) submits this post-hearing regarding proposals to address the transportation credit regulations in the Appalachian Milk Marketing Area (“Order 5”), Florida Milk Marketing Area (“Order 6”) and Southeast Milk Marketing Area (“Order 7”). Select is a Capper-Volstead cooperative which markets milk in the Federal Order system. Select’s members are located principally in the Mideast Milk Marketing Area (“Order 33”) and Southwest Milk Marketing Area (“Order 126”). Select also has non-member shippers located in Order 5 and Order 7. Select’s member milk is, from time to time, delivered to plants regulated by Orders 5 and 7, and Select receives transportation credits on most of those deliveries. The milk of Select’s nonmember farms located in Orders 5 and 7 is producer milk on those Orders.

Select is a member of Dairy Cooperative Marketing Association, the proponent of Proposals 1, 2, 3, 4, and 5.

II. The Role of The Federal Order System

Select is a supporter of the Federal Milk Marketing Order (“FMMO”) system. Any amended Order should be that which the Department deems most effective in protecting the

interest of producers and consumers in an orderly supply of milk to the consumer market. See 7 U.S.C. §608c(4). Select and its members believe that FMMO regulations, in addition to meeting their statutory mandate, should promote the efficiency of milk movements, efficiency of producer operations, and efficiency in milk procurement. Further, amendments to the FMMOs should avoid solutions that artificially create benefits for limited groups of market participants under the guise of a regulatory solution.

While Select generally opposes the use of transportation credits (“TC”) to attract supplies of milk in favor of market economics, the Secretary has previously recognized the unique challenges in attracting sufficient milk to supply markets in the Southeast. As long as a TC program is in place for these marketing areas, they should be kept current and updated to achieve their intended purpose. As the hearing record reflects, the combination of (1) having to haul supplemental milk greater distances and (2) fuel costs which have at times been double the levels during the last revisions to the TC regulations, necessitates adjustments to maintain the viability of the overall TC program. See, e.g., Ex. 12, p.4-5, Ex. 79.

III. Comments on Waiving a Recommended Decision

DCMA has requested that the Secretary omit a recommended decision in this proceeding to expedite the implementation of the proposed changes. Recommended decisions play a critical role in allowing affected market participants to review and advise the Secretary about the intended and unintended effects of critical regulatory amendments. Recommended decisions provide affected parties the opportunity for comment and the Secretary the opportunity for potential refinement before changes take effect through a Final Decision. Select believes that this usual order is among the reasons why the federal order system has endured and continues to benefit dairy producers.

As DCMA's witness noted, cost data used to establish transportation credits were last reviewed in 2006. But the passage of time alone should not provide the basis for eliminating a recommended decision. Rather, the totality of the record must be considered.

The issues under consideration in this proceeding are of the type that could have been handled through notice and comment rulemaking under 5 U.S.C. Sec. 553. The rules of practice for the amendment of milk marketing orders provide, in relevant part:

USDA may elect to use informal rulemaking procedures under 553 of Title 5, United States Code, to amend Federal milk marketing agreements and orders, other than provisions that directly affect milk prices. In making this determination, consideration shall be given to:

- (a) The nature and complexity of the proposal;
- (b) The potential regulatory and economic impacts on affected entities; and
- (c) Any other relevant matters.

7 C.F.R. Sec. 900.32.

The formal rulemaking process is a superior procedure for amending milk marketing orders, and Select strongly agrees with the Secretary's decision to consider these proposals through formal rulemaking. Deviation from the regular order amendment process, and the use of notice and comment rulemaking, should be the rare exception. The factors set forth in Section 900.32, nevertheless, are useful guides for determining whether a recommended decision might be prudently omitted.

Here, the transportation credit regulations do not directly affect milk prices, unlike proposals that would adjust make allowances, yield factors, class differentials, or other elements of the classified price formulas contained within the various orders. Additionally, while milk marketing orders are notoriously complex, within the universe of milk marketing regulations, the issues in this proceeding are comparatively straightforward. Proposals 1 and 2 are updates to existing procedures and terms. Proposals 3, 4, and 5, although new additions to their respective

orders, follow a methodology and operation quite analogous to the existing transportation credit provisions.

The potential economic and regulatory impacts on affected entities are also comparatively minor. Adoption of Proposals 1-5 should not significantly increase the regulatory burden on handlers, nor impose federal order regulation on additional handlers.

In addition, there appears to be a consensus that the transportation credit regulations are in need of being updated. No witness testified in substantial opposition to updating the transportation credit formulas. Unlike many hearings to amend milk marketing orders, there are few competing proposals, and the data upon which the proponents have relied are not subject to disagreement.

By comparison, complex and contentious order amendment proposals would be subject to multiple competing alternatives or even vigorous opposition. In such instances, the interplay of different proposals and alternatives could have dramatic and substantial impacts on the prices paid by handlers, the prices received by producers, and wide-ranging long-term impacts on market order and disorder. In such situations, omitting a recommended decision would be irresponsible. That is not the case here.

Respectfully submitted,
MILTNER REED, LLC

/s/ Ryan K. Miltner
201 East Auglaize Street, Suite 1
New Knoxville, OH 45895
(866) 740-5219
ryan@miltner-reed.com
Counsel for Select Milk Producers, Inc.

CERTIFICATE OF SERVICE

This Post Hearing Brief was filed was served upon the following interested parties by e-mail on April 19, 2023.

Marvin Beshore, Esq.
Counsel for Dairy Cooperative
Marketing Association
mbeshore@johnsonduffie.com

Dennis Tonak
Prairie Farms Dairy, Inc.
dtonak@prairiefarms.com

Chris Hoeger
Prairie Farms Dairy, Inc.
choeger@prairiefarms.com

Michael Sumners
Tri-Hope Dairy Farms
mps@wk.net

Elvin Hollon
Consultant to DCMA
hollone@att.net

Sally Keefe
Milk Innovation Group
skfigures@gmail.com

Hon. Channing Strother
USDA, Chief Administrative Law Judge
channing.strother@usda.gov

Brian Hill, Esq.
Senior Counsel, USDA
brian.hill1@usda.gov

Michelle McMurtray, Esq.
Attorney Advisor, USDA
michelle.mcmurtray@usda.gov

Erin Taylor, Director
USDA-AMS Dairy Programs
Director, Order Formulation & Enforcement
erin.taylor@usda.gov

Lauren Becker
USDA-AMS Dairy Programs
Dairy Marketing Specialist
lauren.becker@usda.gov

Rebecca Dickerson
USDA-AMS Dairy Programs
Dairy Marketing Specialist
rebecca.dickerson@usda.gov

/s/ Ryan K. Miltner
Counsel for Select Milk Producers, Inc.